JAKS-KDEB Consortium Sdn Bhd v Perbadanan Urus Air Selangor Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–1452 OF 2006
HASNAH MOHAMMED HASHIM JC
23 DECEMBER 2011

Contract — Breach — Agreement for exclusive rights — Non-exclusive agreements — Agreement to supply water pipes and fittings for waterworks projects — Defendant ceasing to purchase pipes and fittings from plaintiff — Whether products to be purchased on project to project basis — Whether an exclusive contract — Defendant retained discretion whether or not to purchase pipes and fittings from plaintiff — Whether breach established

Tort — Conspiracy — Conspiracy of unlawful means — Inducement of breach of contract — Unlawful interference with contractual relations — Agreement to supply water pipes and fittings for waterworks projects between plaintiff and third defendant — Rights and liabilities of third defendant vested into first defendant — First defendant's shareholding acquired by second defendant — First defendant ceasing to purchase pipes and fittings from plaintiff — Whether second defendant conspired with first defendant to cause loss to plaintiff — Whether conspiracy to directly or indirectly interfere with contract by unlawful means — Whether intention to injure or cause loss to plaintiff shown

On 25 October 2001 the plaintiff and the third defendant executed an agreement to supply and sell to the third defendant water pipes and fittings for implementation of its waterworks projects. On 15 Mac 2002 the first defendant and the third defendant entered into a corporatisation agreement. By vesting order (Sel PU 35) dated 26 September 2003 the Menteri Besar of Selangor appointed 15 Mac 2002 as the vesting date where all properties, rights and liabilities of the third defendant in respect of the supply and distribution of treated water supply services were transferred to and vested in the first defendant. The first defendant shareholding were acquired by the second defendant by an agreement dated 8 December 2004. On 15 December 2004 the second defendant, the third defendant and the Federal Government executed a concession agreement. The second defendant was granted a concession of 30 years to supply and distribute treated water in the Selangor and the Federal Territories of Kuala Lumpur and Putrajaya. On 10 May 2006 the second vesting order was issued vesting all rights and liabilities of the third defendant to the first defendant. The plaintiff contended that the first defendant had in breach of its obligations under the supply agreement,

unilaterally ceased to purchase from the plaintiff the pipes and fittings for all projects in respect of water distribution and/or supply services carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya. The plaintiff also claimed that the second defendant with the full knowledge of the first defendant's obligations under the said supply agreement used its position of control over the first defendant to prevent the first defendant from fulfilling its obligations under the supply agreement by causing the first defendant to cease purchasing from the plaintiff the pipes and fittings. It was further contended that the second defendant negligently and/or fully conspired and combined with the first defendant, with the sole or predominant intention of injuring the plaintiff and/or causing loss to the plaintiff by ceasing to purchase the pipes and fittings. Hence the plaintiff claimed for the alleged losses and damages as a result thereof. The defendants submitted that the supply contract was a long term contract and was not an exclusive contract. Hence, it was contended that the third defendant retained the discretion to decide whether or not to purchase the pipes and fittings from the plaintiff.

Held, dismissing the plaintiff's claim with cost:

(1) The terms laid out in the agreement had clearly and unequivocally reflected the intention of the Selangor State Government. The products were to be purchased on a project to project basis. The State Government will not be tied to one supplier only and procurement of such products may be made from other sources. The parties were 'ad idem' that exclusivity was never a condition to be incorporated into the agreement. Since the supply agreement was entered into by the parties was devoid of any intention to grant any form of exclusivity to one party, the first defendant was therefore not in breach of the supply agreement by failing to order or purchase the pipes and fittings from the plaintiff (see paras 25, 31 & 39).

(2) The plaintiff failed to adduce any evidence to show that there was direct or indirect interference coupled with unlawful means or that the first and/or second defendant had the intent to interfere with the supply agreement (see para 41).

(3) In the tortious act of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiff. Where the act is lawful, the predominant purpose must be to cause loss to the plaintiff for there to be conspiracy. If the predominant purpose is for the self interest or protection of the defendants, it is not an unlawful purpose and there is no conspiracy, even if the plaintiff incidentally suffers loss (see paras 42–43); *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ (Rep) 243 referred.

(4) No evidence was adduced by the plaintiff to show that there was any form

of agreement between the second defendant with any third parties with the dominant purpose of damaging and actually damaging the plaintiff. No evidence was adduced by the plaintiff to prove an allegation of conspiracy. The plaintiff failed to establish that the concession agreement was for the purpose of injuring the plaintiff and the execution of that agreement resulted in damage to the plaintiff (see paras 52–53).

(5) Pursuant to the Water Supply (Successor Company) Enactment 2001 (Selangor) ('Enactment') and the issuance of a vesting order by the Menteri Besar of Selangor, the third defendant had duly transferred all its rights and liabilities in respect of water supply services, including those arising under the supply agreement. These acts by themselves were not unlawful neither were they brought by unlawful means. These acts were executed under existing and valid Enactments and the vesting orders were properly issued in accordance with the laws and regulations at all material times. The second defendant was therefore neither negligent nor had willfully conspired and/or combined with the first defendant with the predominant or sole intention of injuring and/or causing loss to the plaintiff by ceasing to purchase or cause to be purchased the plaintiff s products as contended by the plaintiff (see paras 55–57).

(6) Both of the vesting orders were valid as it was made pursuant to s 3(1) of the Enactment which give powers to the Menteri Besar to vest all rights and liabilities of the state to a substitute company. Therefore, the third defendant had lawfully vested all its rights and/or obligations of the supply agreement between the plaintiff and the third defendant to the second defendant (see para 69).

[Bahasa Malaysia summary

Pada 25 Oktober 2001 plaintif dan defendan ketiga memeterai satu perjanjian untuk membekal dan menjual kepada defendan ketiga paip air dan kelengkapan untuk pelaksanaan projek airnya. Pada 15 Mac 2002 defendan pertama dan defendan ketiga memasuki satu perjanjian pensyarikatan. Melalui perintah peletakhakkan (Sel PU 35) bertarikh 26 September 2003 Menteri Besar Selangor menyatakan 15 Mac 2002 sebagai tarikh peletakhakkan di mana kesemua, harta, hak-hak dan liabiliti-liabiliti defendan ketiga berkaitan dengan pembekalan dan penghantaran perkhidmatan bekalan air yang dirawat dipindahkan dan diletakhakkan kepada defendan pertama. Pemegangan saham defendan pertama diperoleh oleh defendan kedua melalui perjanjian bertarikh 8 Disember 2004. Pada 15 Disember 2004 defendan kedua, defendan ketiga dan Kerajaan Persekutuan memeterai perjanjian konsesi. Defendan kedua diberikan konsesi 30 tahun untuk membekal dan menghantar air yang dirawat di Selangor dan Wilayah Persekutuan Kuala Lumpur dan Putrajaya. Pada 10 Mei 2006 perintah peletakhakkan kedua dikeluarkan meletakhakkan kesemua hak dan liabiliti defendan ketiga kepada defendan pertama. Plaintif menghujah bahawa defendan pertama telah

melanggar kewajipannya di bawah perjanjian bekalan, apabila secara sebelah pihak berhenti membeli daripada plaintif paip dan kelengkapan bagi kesemua projek berkaitan dengan penghantaran air dan/atau perkhidmatan pembekalan yang dijalankan di Negeri Selangor termasuk Wilayah Persekutuan Kuala Lumpur dan Putrajaya. Plaintif juga menghujah bahawa defendan kedua dengan pengetahuan penuh kewajipan defendan pertama di bawah perjanjian pembekalan tersebut menggunakan kedudukannya yang mempunyai kawalan terhadap defendan pertama untuk menghalang defendan pertama daripada memenuhi kewajipannya di bawah perjanjian pembekalan tersebut dengan menyebabkan defendan pertama berhenti membeli daripada plaintif paip-paip dan kelengkapan. Selanjutnya juga dihujahkan bahawa defendan kedua secara cuai dan/atau secara sepenuhnya bersubahat dan bersama dengan defendan pertama, dengan satu-satunya niat atau niat pradominan merugikan plaintif dan/atau menyebabkan kerugian kepada plaintif dengan berhenti membeli paip dan kelengkapan. Justeru plaintif menuntut untuk kerugian dan kerosakan yang didakwa akibat daripadanya. Defendan-defendan menghujah bahawa kontrak pembekalan tersebut merupakan kontrak jangka panjang dan bukan kontrak eksklusif. Maka, dihujahkan bahawa defendan ketiga mempunyai budi bicara untuk memutuskan sama ada atau tidak untuk membeli paip-paip dan kelengkapan daripada plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Terma-terma yang dinyatakan di dalam perjanjian jelas menggambarkan niat Kerajaan Negeri Selangor. Produk-produk tersebut akan dibeli berdasarkan kepada projek. Kerajaan Negeri tidak akan terikat kepada satu pembekal sahaja dan pembelian (*procurement*) produk sedemikian boleh dibuat daripada sumber-sumber yang lain. Pihak-pihak adalah '*ad idem*' bahawa keistimewaan tidak pernah menjadi syarat untuk dimasukkan di dalam perjanjian tersebut. Oleh sebab perjanjian pembekalan dimasuki oleh pihak-pihak adalah tanpa apa-apa niat untuk memberikan apa-apa bentuk keistimewaan kepada satu pihak defendan pertama oleh itu tidak melanggar perjanjian pembekalan kerana gagal memesan atau membeli paip-paip dan kelengkapan daripada plaintif (lihat perenggan 25, 31 & 39).

(2) Plaintif gagal untuk mengemukakan apa-apa keterangan untuk menunjukkan bahawa terdapat campur tangan secara langsung atau tidak langsung secara tidak sah atau bahawa defendan pertama dan/atau kedua mempunyai niat untuk campur tangan dengan perjanjian pembekalan (lihat perenggan 41).

(3) Di dalam tindakan tort bersubahat, perlu ada perjanjian atau kombinasi dua atau lebih dengan niat bersama untuk menyebabkan tujuan tidak sah atau untuk melakukan tindakan yang tidak sah dengan cara yang

menyalahi undang-undang yang akan menyebabkan kerugian kepada plaintif. Di mana tindakan tersebut adalah sah, tujuan utama mestilah untuk menyebabkan kerugian kepada plaintif untuk wujud konspirasi. Jika tujuan utama adalah untuk kepentingan sendiri atau perlindungan defendan-defendan, ia bukan tujuan yang salah dari segi undang-undang dan tidak ada konspirasi, walaupun plaintif mengalami kerugian (lihat perenggan 42–43); *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ (Rep) 243 dirujuk.

(4) Tidak ada keterangan yang dikemukakan oleh plaintif untuk menunjukkan bahawa terdapat apa-apa bentuk perjanjian di antara defendan kedua dengan mana-mana pihak ketiga dengan tujuan utama merugikan dan sebenarnya merugikan plaintif. Tidak ada keterangan yang dikemukakan oleh plaintif untuk membuktikan dakwaan konspirasi. Plaintif gagal untuk membuktikan bahawa perjanjian konsesi tersebut adalah bertujuan untuk menjejaskan plaintif dan pemeteraian perjanjian tersebut mengakibatkan kerugian kepada plaintif (lihat perenggan 52–53).

(5) Berikutan Enakmen Bekalan Air (Syarikat Pengganti) 2001 (Selangor) ('Enakmen') dan pengeluaran perintah peletakhakkan oleh Menteri Besar Selangor, defendan ketiga telah memindahkan kesemua hak dan liabilitinya berkaitan dengan perkhidmatan pembekalan air, termasuk yang berbangkit daripada perjanjian pembekalan. Tindakan-tindakan ini dengan sendirinya bukan tidak sah dan juga tidak dibuat melalui cara yang tidak sah dari segi undang-undang. Tindakan-tindakan ini dibuat di bawah Enakmen dan perintah peletakhakkan yang sedia ada dan sah dan dikeluarkan secara wajar menurut undang-undang dan peraturan pada kesemua masa material. Defendan kedua oleh itu bukan cuai atau telah dengan sengaja bersubahat dan/atau bersatu dengan defendan pertama dengan satu-satunya niat atau niat pradominan untuk merugikan dan/atau menyebabkan kerugian kepada plaintif dengan berhenti membeli atau menyebabkan produk plaintif dibeli seperti yang dinyatakan oleh plaintif (lihat perenggan 55–57).

(6) Kedua-dua perintah peletakhakkan adalah sah kerana ia dibuat menurut s 3(1) Enakmen yang memberikan kuasa kepada Menteri Besar untuk meletakhakkan kesemua hak dan liabiliti negeri kepada syarikat pengganti. Dengan itu, defendan kedua telah diletakhakkan secara sah kesemua hak dan/atau kewajipannya dalam perjanjian pembekalan di antara plaintif dan defendan ketiga kepada defendan kedua (lihat perenggan 69).]

Notes

For a case on agreement for exclusive rights, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2940.

For cases on conspiracy by unlawful means, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 74–75.

Cases referred to

Colonial Ammunition Co v Reid (1900) 21 NSW 338, SC (refd)
Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, HL (refd)
Hadland Arthur John & Anor v Audra Elaine Gomez [2010] 2 CLJ 78, HC (refd)
Lonrho Plc v Fayed and others [1991] 3 All ER 303, HL (folld)
Ng Hong Chai v JB Securities [2009] 1 MLJ 250; [2009] 1 CLJ 57, CA (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, HL (refd)
Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors [2005] 2 MLJ 32, CA (refd)
Queen, The v Demers [1900] AC 103, PC (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)
SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd [2008] 4 MLJ 187; [2008] 4 CLJ 20, CA (refd)
Transwater Tenaga Sdn Bhd v APS Technologies Sdn Bhd & Anor [2007] 1 MLJ 301; [2007] 1 CLJ 159, CA (refd)
Yap JH v Tan Sri Loh Boon Siew & Ors [1991] 4 CLJ (Rep) 243 (refd)

Legislation referred to

Companies Act 1965
Menteri Besar (Incorporation) Enactment 1994 (Selangor)
Water Supply (Successor Company) Enactment 2001 (Selangor) s 3(1)

David Hoh (WS Teo with him) (Lim & Hoh) for the plaintiff/appellant.
Steven Thiru (Hajinder Kaur, Eric Chong and David Matthews with him) (Shahrizat Rashid & Lee) for the first and second defendants.
Azhari (Senior Federal Counsel) for the third defendant.

Hasnah Mohammed Hashim JC:

[1] The plaintiff is a company incorporated in Malaysia having its registered address at 21–2, Jalan Tiara 3, Bandar Baru Klang, 41150 Klang, Selangor, Darul Ehsan. The plaintiff company is a Consortium comprising of Kumpulan Darul Ehsan Bhd ('KDEB') (30%), the Selangor State Government's investment arm and having its registered address at 16th Floor, Plaza Peransang, Persiaran Perbandaran, 40000 Shah Alam Selangor Darul Ehsan and JAKS Sdn Bhd ('JAKS') (70%), a company incorporated in Malaysia under the Companies Act 1965.

[2] The first and second defendants are limited and private limited companies respectively incorporated under the Companies Act 1965. The

third defendant is the State Government of Selangor.

BRIEF BACKGROUND

[3] On 25 October 2001 the plaintiff and the third defendant executed an agreement to supply and sell to the third defendant water pipes and fittings for implementation of its waterworks projects. On 15 March 2002 the first defendant and the third defendant entered into a corporatisation agreement.

[4] By vesting order (Sel PU 35) dated 26 September 2003 the Menteri Besar of Selangor appoints 15 March 2002 as the vesting date wherein all properties, rights and liabilities of the third defendant in respect of the supply and distribution of treated water supply services were transferred to and vested in the first defendant.

[5] The first defendant shareholding were acquired by the second defendant by an agreement dated 8 December 2004 between the first, second, third defendants and Kumpulan Darul Ehsan Bhd.

[6] On 15 December 2004 the second defendant, the third defendant and the Federal Government executed a concession agreement. The second defendant was granted a concession of 30 years to supply and distribute treated water in the Selangor and the Federal Territories of Kuala Lumpur and Putrajaya.

[7] On 10 May 2006 the second vesting order was issued vesting all rights and liabilities of the third defendant to the first defendant.

THE PLAINTIFF'S CASE

[8] It is the plaintiff's contention that:

(a) the first defendant in breach of its obligations under the supply agreement, which had been statutorily transferred from the State Government and vested in the first defendant and/or the first defendant at the direction of the second defendant, from 1 January 2005, or thereabouts for no good nor apparent reason, unilaterally ceased to:

(i) purchase from the plaintiff; or

(ii) cause to be purchased from the plaintiff.

the pipes and fittings for all projects in respect of water distribution and/or supply services carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya.

(b) the second defendant with the full knowledge of the first defendant's

obligations under the said supply agreement used its position of control over the first defendant to prevent the first defendant from fulfilling its obligations under the supply agreement by causing the first defendant to cease:

(i) purchasing; or

(ii) cause to be purchased

from the plaintiff the pipes and fittings for all projects in respect of water distributor and/or supply services carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya. The second defendant instead directed all tenderers for these projects to procure such pipes and fittings from third parties and/or its nominees Laksana Wibawa Sdn Bhd and/or Musa and Rahman Plastic Industries Sdn Bhd;

(c) the second defendant negligently and/or fully conspired and combined with the first defendant, with the sole or predominant intention of injuring the plaintiff and/or causing loss to the plaintiff by ceasing to:

(i) purchase; or

(ii) cause to be purchased.

from the plaintiff the pipes and fittings for all projects in respect of water supply services carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya and instead directing all tenderers for these projects to, inter alia procure such pipes and fittings from third parties and/or its nominees Laksana Wibawa Sdn Bhd and/or Musa and Rahman Plastic Industries Sdn Bhd.

[9] By reason of the above described breaches of contract and/or wrongful and/or negligent acts of the first, second and/or third defendants, the plaintiff contended that they suffered loss and damages.

[10] According to the statement of claim the plaintiff's claims are as follows:

As against the first and second defendants

(a) a declaration that the second defendant conspired and/or combined with the first defendant with the sole or predominant intention of injuring the plaintiff and/or causing loss to the plaintiff;

(b) an injunction to immediately restrain the first and/or second defendants whether by themselves, their agents, servants, directors, contractors, nominees and/or all related parties to the first and/or second defendants and/or assignees and/or *successors-in-title or otherwise* howsoever by injunction be restrained from purchasing and/or obtaining and/or being

given and/or dealing with and/or receiving all its requirements for the pipes (which includes straight pipes whether whole or in cut lengths of any material including but not limited to mild steel pipes) and fittings (which included tees, bends, tapes, tapers, collars, flange adaptor, blanks flanges, mechanical joints and similar accessories) (hereinafter collectively referred to as the said pipes and fittings) in respect of all water projects being carried out or to be carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya from and other entities except from the plaintiff until 24 October 2011; and

(c) an injunction to immediately restrain the first and/or second defendants whether by themselves, their agents, servants, directors, contractors, nominees and/or all related parties to the first and/or second defendants and/or assignees and/or successors-in-title or otherwise howsoever by injunction be restrained from taking any further steps in supplying and/or dealing with all pipes and fittings and/or including the negotiations and/or awarding of contracts with any other entities arising out of and in connection with purchasing and/or obtaining and/or being given and/or receiving all of its requirements for pipes and fittings in respect of all water projects being carried out or to be carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya from and other entities except from the plaintiff until 24 October 2011.

As against the first defendant

(a) a declaration that the first defendant is in breach of its obligations under the supply agreement;

(b) specific performance of the supply agreement dated 25 October 2001; and/or

(c) damages in lieu of and/or in addition to specific performance; and/or

(d) exemplary and/or aggravated damages.

As against the second defendant

(a) a declaration that the second defendant had committed the tort of procurement of breach of contract;

(b) a declaration that the second defendant had not authorised in its own name and/or the name of or through the second defendant's agents, servants, directors, nominees, contractors and/or related parties to the second defendant and/or its assignees and/or successors-in-title to give, supply, sell and/or award contract to any third party concerning supply of water pipes and related fittings for all water projects in Selangor including the Federal Territories of Kuala Lumpur and Putrajaya; and

(c) an injunction order against the second defendant whether by themselves, their agents, servants, directors, contractors, nominees and/or all related parties to the second defendant and/ or their assignees and/or their successors-in-title or otherwise howsoever by injunction to be restrained from preventing the first defendant from performing its contractual obligations under the supply agreement dated 25 October 2001 until the final disposal of the plaintiff's suit herein.

As against the first and second defendants

(a) damages; and/or

(b) exemplary and/or aggravated damages;

(c) interest at the rate of 8%pa or such rate as to be determined by the honourable court;

(d) cost; and

(e) such further and other relief as the court deems fit.

As against the third defendant

(a) a declaration that the third defendant has lawfully vested all its rights and/or obligations of the supply agreement dated 25 October 2001 between the plaintiff and the third defendant to the first defendant;

(b) in the alternative, if the court finds that the third defendant has not lawfully vested all its rights and/or obligations of the supply agreement dated 25 October 2001 to the first defendant, then a declaration that the third defendant is in breach of supply agreement dated 25 October 2001; and/or

(c) specific performance of the supply agreement dated 25 October 2001; and/or

(d) damages in lieu of and/or in addition to specific performance; and/or

(e) exemplary and/or aggravated damages;

(f) cost; and

(g) such further and/or other reliefs.

THE DEFENDANT'S CASE

[11] It is the first and second defendants' contention that the supply contract is a long term contract and not an exclusive contract. Their contention is supported by the fact that the supply contract is described as 'Agreement for the long term contract to supply pipes and fittings …' (Recital D of the supply

contract). The third defendant, who is a party to the supply contract, also had described the supply contract as a long term contract in para 16(a) of its re-amended defence.

[12] The first and second defendants further contended that the third defendant retains the discretion to decide whether or not to purchase the pipes and fittings from the plaintiff by virtue of cl 2.1 of the supply contract which provides that 'the State Government hereby agrees to purchase from the Consortium or cause to be purchased from the Consortium the Products on *a project to project basis*'.

[13] It is also contended that the plaintiff had accepted that there was no commitment from the state to purchase the pipes for the whole ten year. Furthermore the phrase 'all projects' or 'every project' is absent in the supply contract. Therefore there is a difference between the words 'project to project basis and 'all projects'.

[14] The first and second defendant also contended that the supply contract is not an exclusive contract and relied on the case of *The Queen v Demers* [1900] AC 103 and *Colonial Ammunition Co v Reid* (1900) 21 NSW 338.

[15] Counsel for the first and second defendants also highlighted provisions in the three drafts of the supply agreement. In the first draft dated 13 September 2001, cll 2.1, 2.2 and 2.3 reads as follows:

> The Supplier hereby agrees to supply and sell to the Government and the Government hereby agrees to purchase from the Supplier or cause to be purchased from the Products on a project to project basis of such quantities per annum more particularly set out in Schedule 1 hereto for an initial term of ten (10) years commencing from the date hereof at the prices more particularly set out in Schedule 2 hereto and upon the term and conditions hereinafter set out.
>
> The Government hereby undertakes that during the subsistence of this Agreement, the Government shall purchase all of its requirements for the Products in respect of all projects to be carried out by Jabatan Bekalan Air Selangor or other agencies or departments of the Government solely and exclusively from the Supplier.
>
> The Government shall further cause all parties including but not limited to private enterprise, corporations and quasi-govemment bodies which are awarded with waterworks, water treatment plants and water supply projects within the State to purchase all requirements for the Products solely and exclusively from the Supplier. The terms and conditions of this Agreement shall equally apply, govern and be binding on such third parties to the exclusion of any other terms and conditions to the contrary save and except where the same has been expressly agreed by the Supplier in writing.

[16] However in the second draft, the words 'solely and exclusively' in cl 2.2

were removed by mutual consent. Clause 2.3 was also deleted in its entirety. Learned counsel for the first and second defendants further submitted that the deletion of the words and the clause extinguished the plaintiff's proposed exclusive right to supply the products under the supply contract. A new cl 2.2 was inserted as follows:

> In the event the Consortium is unwilling or refuses to supply the products to the Government in accordance with the requirements of JBA, the Government shall be at liberty to purchase from other suppliers those Products which the Consortium is unwilling or refuse to supply provided always the JBA shall first have given at least sixty (60) days prior written notice to the Consortium and the Consortium has failed meanwhile to revert to the JBA of the intention to supply the products.

[17] In the third draft which is the final draft of the supply agreement, the words 'of such quantity per annum' were also removed. It is submitted that the third defendant was only obliged to purchase the products on a project to project basis. This is further strengthened by the letter of award issued by Majlis Tindakan Ekonomi Selangor ('MTES') dated 11 July 2001 (exh P5) where it was expressly stipulated that the products were to be purchased on a 'project to project basis' and that 'Kerajaan tidak terikat menerima bekalan satu sumber sahaja …'. By a letter dated 25 July 2001 MTES also notified that the third defendant will enter into the agreement on condition that 'Kerajaan Negeri bebas mendapatkan bekalan paip keluli dari punca-punca lain'.

LAW AND FINDINGS

Whether the first defendant is in breach of the supply agreement by unilaterally and without just cause or reason by not ordering nor purchasing the pipes and fittings from the plaintiff after 1 January 2005

[18] By virtue of the supply agreement dated 25 October 2001 the State Government of Selangor ('State Government') awarded the contract to supply pipes and fittings for all water works projects in the whole State of Selangor Darul Ehsan including the Federal Territory of Kuala Lumpur and Putrajaya to the plaintiff company.

[19] By a letter dated 11 July 2001 ('P5') addressed to the Jabatan Bekalan Air Selangor ('JBA') the MTES had officially informed that the executive committee had considered and approved the proposed contract to supply steel pipes for the State of Selangor by the plaintiff company subject to the following terms:

(a) Bersetuju pada dasarnya untuk menawarkan kontrak jangka panjang bekalan paip kepada Konsortium JAKS-KDEB dengan ekuiti 70:30;

(b) Bersetuju pelaksanaan kontrak bekalan air Kerajaan Negeri dibuat mengikut pembahagian kerja iaitu kerja-kerja sivil dan pembinaan, bekalan paip air …

(c) Peratusan pembahagian kerja kontrak bagi setiap projek adalah mengikut projek-projek tertentu (project by project basis) yang akan diputuskan oleh Kerajaan Negeri.

(d) …

(e) …

(f) Penawaran jenis paip dan saiz paip hendaklah dipelbagaikan mengikut keperluan JBAS dan tidak terikat kepada paip keluli sahaja.

(g) Semua spesifikasi bagi penawaran kontrak hendaklah diluluskan oleh Kerajaan Negeri terlebih dahulu.

(h) …

(i) Kerajaan tidak terikat menerima bekalan satu sumber sahaja.

(j) …

(k) …

(l) Satu Perjanjian kontrak jangka panjang hendaklah diluluskan dan ditandatangani oleh Kerajaan Negeri iaitu untuk tempoh pertama selama 10 tahun.

[20] Based on the letter above the agreement to supply pipes and fittings was duly executed setting out the terms and conditions.

[21] Clause 2.1 of the supply agreement provides:

> The Consortium hereby agrees to supply and sell to the State Government and the State Government hereby agrees to purchase from the Consortium or cause to be purchased from the Consortium, the Products on a project to project basis for the initial term of ten (10) years commencing from the date hereof at the prices more particularly set out in Schedule 1 hereto (which may be varied in accordance with the provisions of Clause 10 herein below) upon the terms and conditions hereinafter set out.

[22] Clause 2.2 further provides that:

> The State Government hereby undertakes that during the subsistence of the Agreement, the State Government shall purchase all requirements for the Products in respect of all project to be carried out in the State from the Consortium subject always to Clause 10 herein. In the event that the Consortium is unable to supply the Products to the State Government. the State Government shall be at liberty to purchase from other suppliers provided always that JBA shall first have given thirty (30) days prior written notice of the same to the Consortium.

[23] Under the aforesaid supply agreement the word 'pipes' is defined under cl 1.1 as:

> … straight pipes whether whole or in cut lengths of any material including but not limited to mild steel pipes.

[24] The word 'fittings' is defined as:

> … tees, bends, tapers, collars flange, adapters, blank flanges, mechanical joints and similar accessories.

[25] The terms laid out in the agreement has clearly and unequivocally reflected the intention of the Selangor State Government and these are consistent with the conditions set out in the letter issued by MTES. The products were to be purchased on a project to project basis. The State Government will not be tied to one supplier only and procurement of such products may be made from other sources. PW2, Lim Gin Gee, who was JAKS Sdn Bhd's chief operating officer from October 2001 until June 2004 in his witness statement explained that even though the words 'project to project basis' was drafted into the supply agreement it was merely meant to facilitate the purchase of the pipes. The main intention of the parties according to the PW2 was that the State Government would buy all the pipes from one supply company for all the water works projects in the distribution area for a period of ten years. He also said in his witness statement that the plaintiff were informed that the state could not possibly buy the entire ten years supply of pipes and fittings at any one time because of budget constraints.

[26] Furthermore according to PW2 the state could not confirm the quantity required. Therefore the practical solution was to purchase the products on a job to job basis but always ensuring that all pipes and fittings for all the projects in the distribution area were bought from the plaintiff. When he was cross examined he admitted that the words 'solely and exclusive' were removed:

> A: Yes we agreed to remove … the parties agreed to remove.

[27] Abdul Malik Ishak JCA in his dissenting judgment in *Ng Hong Chai v JB Securities* [2009] 2 MLJ 250; [2009] 1 CLJ 5 referred to the case of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 where Lord Diplock said that the:

> … basic principle of the common law of contract, … is that parties to a contract are free to determine for themselves what primary obligations they will accept.

[28] The parties, in particular the plaintiff and the third defendant had negotiated the terms of the supply agreement and had been at all material times aware that the terms would be based on the decision of the executive committee of MTES as reflected in their letter which was consequently incorporated into the supply agreement.

[29] Justice Abdul Malik went on further to say that:

> In construing the terms of the present agreement, one must endeavor to discover the intention of the parties It is 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' (*Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkin & Sons (A Firm) and Others* at p 912). The cardinal principle to adhere to is this. That the parties have intended what they have in fact said, so that their words must be construed as they stand (*British Movienews Ld v London and District Cinemas Ld* [1952] AC 166). At the end of the day, the meaning of an ordinary English word (*Brutus v Cozens* [1973] AC 854, 861; and *Belgravia Navigation Co SA v Cannor Shipping Ltd (the 'Troll Park')* [1988] Vol 2 Lloyd's Rep 423 (CA)), and the meaning of any technical or commercial terms (*Hill v Evans* (1862) 45 ER 1195, Chancery; 4 De GF&J 288, 295,), and the meaning of latent ambiguities (*Robinson v Wray* (1865–66) LR 1 CP 490) as well as the need to look at the surrounding circumstances are all questions of fact (*Simpson v Margitson and others* (1847) ER 116 King's Bench; 11 QB 23,) for the court to consider. These are exercises which our judges are familiar with and can easily be carried out expeditiously.
>
> The law journals are replete with authorities on construction of contracts. It is an acceptable approach to say and I so say that the words are to be given their ordinary and natural meaning. Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkin & Sons (A Firm) And Others* at p 913 aptly said:
>
> > (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.
> >
> > Therefore, the rule that the words employed must be construed in their ordinary sense can be departed from where the meaning would simply involve an absurdity beyond description If the words construed in its ordinary sense give rise to an unreasonable result, then it is unlikely that that is the intention of the parties. Indeed, this is also the view of Lord Reid in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, at p 251 where His Lordship said succinctly:
> >
> > The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely

A it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear ….

[30] PW1, Chee Seong Heng, Group Senior General Manager of JAKS Resources Bhd during cross-examination by counsel of the third defendant admitted that the plaintiff never asked for the sole and exclusive right to supply the products to the third defendant.

[31] PW2 had also admitted that the plaintiff and the third defendant had voluntarily agreed to drop the requirement for a sole and exclusive contract. It is therefore clear that the parties were 'ad idem' that exclusivity was never a condition to be incorporated into the agreement.

[32] The first and second defendants contended that although there is ambiguity between cl 2.1 and cl 2.2, as a matter of law, cl 2.1 must prevail over cl 2.2. The first and second defendants relied on principle set out in *Kim Lewison's The Interpretation of Contracts* which states that 'If a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails'. This principle was applied in the case of *Hadland Arthur John & Anor v Audra Elaine Gomex* [2010] 2 CLJ 78. Moreover, the first and second defendants submitted that cl 2.1 is consistent with the letter of award by MTES.

[33] In addition, the first and second defendants further submitted that an interpretation of cl 2.2 that gives exclusivity to the plaintiff ought to be rejected on the basis that it is ambiguous, contradictory and repugnant. The first and second defendants contended that while the first part of cl 2.2 appeared to give the plaintiff an exclusive right, the second part of the clause allows the third defendant to source the products from other parties.

[34] The manner in which the terms of the supply agreement were performed and executed proved that it was not an exclusive contract. It was adduced from DW1 that during the currency of the supply agreement, the first defendant did order pipes and fittings from other parties such as Dura-Mine Sdn Bhd, Lestari Nilam Sdn Bhd, Poly Steel Pipe Sdn Bhd and Yew Lean Foundry Co Sdn Bhd. This was supported by the purchase orders and agreements ('exhs D60–D67'). The first and second defendants relied on the case of *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors* [2005] 2 MLJ 32. There were no objections whatsoever from the plaintiff when these transactions were conducted in fact not even a slight complaint was made by the plaintiff to the first, second and/or the third defendants.

[35] IDD48 which is the 'Cabutan Keputusan Mesyuarat Majlis Kerajaan

Negeri' on 3 July 2001 and IDD49 which is the letter from the third defendant confirming the decision of the executive committee could not considered or evaluated as the original documents and the makers were not called. However this court cannot ignore the specific provisions contained in the agreement (P4) in particular cl 1.2 which provides that,

> …The appendix and schedules hereto shall be taken, read and construed as essential parts of this Agreement.

[36] The award letter (P5) form an essential part as it is appended to the agreement ('P4') stating that the supply is on a project to project basis and that the supply of pipes shall not be from one source only. Based on P4 the intention of the State Government was clearly laid out and the plaintiff company could not now say otherwise as they had agreed to the terms and conditions of P4. It is obvious in this case that the phrase 'project to project basis' does not mean exclusivity or a monopoly. The intention of the parties is clearly reflected in the provisions of the agreement. I therefore agree with the submission of the first and second defendant's counsel submission that cl 2.1 is consistent with the letter of award by MTES (P5).

[37] Oral and documentary evidence have been adduced to show that the plaintiff's main shareholder JAKS Sdn Bhd had participated in the tender process to supply pipes and fittings under the concession agreement.

[38] Hence for this reason, the plaintiff knew that the supply agreement, was not an exclusive contract. The plaintiff's main shareholder would not have participated in the tender process and ought to have challenged it if it had been intended to be an exclusive contract.

[39] Therefore it is my considered view after weighing the probative value of both the oral and documentary evidence brought before this court that the supply agreement was entered into by the parties hereto is devoid of any intention to grant any form of exclusivity to one party albeit in this case, the plaintiff company. Hence the first defendant is not in breach of the supply agreement by failing to order or purchase the pipes and fittings from the plaintiff after 1 January 2005.

Whether the second defendant was negligent and/or willfully conspired and/or combined with the first defendant with the predominant or sole intention of injuring and/or causing loss to the plaintiff bv ceasing to purchase or cause to be purchased the plaintiff's products

[40] The first and second defendants contended that the plaintiff failed to

satisfy the five requirements as stated in the case of and *Transwater Tenaga Sdn Bhd v APS Technologies Sdn Bhd & Anor* [2007] 1 MLJ 301; [2007] 1 CLJ 159, reaffirmed in *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 147; [2008] 4 CLJ 20 where Ahmad Maarop (JCA) said that:

> The law regarding the tort of inducement to breach of contract as summarised in *Greig v Insole* [1878] 2 All ER 449 at p 484 was restated by this court in *Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 2 CLJ 132 at p 145:
>
> > At common law it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:
> >
> > First, there must be (a) 'direct' interference or (b) 'indirect' interference coupled with the use of unlawful means: see per Lord Denning MR in *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, at p 138. As to the meaning of 'interference' this is not confined to the actual procurement or inducement of a breach of contract. It can cover a case where the third person prevents or hinders one party from performing his contract even though this be not a breach: see per Lord Denning MR.
> >
> > Secondly, the defendant must be shown to have knowledge of the relevant contract
> >
> > Thirdly, he must be shown to have had the intent to interfere with it. Fourthly, in bringing an action, other than a quia timet action, the plaintiff must show that he has suffered special damage, that is, more than nominal damage: see *Rookes v Barnard* [1964] AC 1129, at p 1212, per Lord Devlin. In any quia timet action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful: see *Emerald Construction Company Ltd v Lowthian* [1966] 1 WLR 691, at p 703, per Diplock LJ.
> >
> > Fifthly, so far as it is necessary the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.
>
> Slade J went on further to emphasise one point on the same page thus:
>
> If these five conditions are fulfilled and the defendant is shown to have had that intention to interfere with the relevant contract which is necessary to constitute the tort it is quite irrelevant that he may have acted in good faith and without malice or under a mistaken understanding as to his legal rights; good faith, as such, provides no defence whatever to claim based on this tort: see, for example *South Wales Miner's Federation v Glamorgan Coal Co Ltd* [1905] AC 239 per Lord Macnaghten.
>
> > In the tort of conspiracy, there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means resulting in damages to the plaintiff (*Industrial Concrete Products Bhd v Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262, *Mulcahy v R* (1868) LR 3 HL 306 at 317 and *Belmont Finance v Williams Furniture (No 2)* [1980] 1 All ER 393 at p 403).

[41] The plaintiff failed to adduce any evidence to show that there was direct or indirect interference coupled with unlawful means or that first and/or second defendants had the intent to interfere with the supply agreement. The first and second defendant further submitted that there was no issue of unlawful means as the concession agreement was an effort by the Federal Government to promote the water services industry and to provide better services to the consumers. These efforts were never intended to derail or interfere with the supply agreement.

[42] In the tortious act of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiff. Mohamed Dzaiddin J (as he then was) in *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ (Rep) 243 referred to the case of *Lonrho Plc v Fayed and Others* [1991] 3 All ER 303 where House of Lords affirmed that there are two types of conspiracies:

> … (a) A and B combine to do an lawful act for an unlawful purpose which causes loss to a third party, C; and
>
> (a) A and B combine to do an unlawful act which causes loss to C ….

[43] Applying the above principles where the act is lawful, the predominant purpose must be to cause loss to the plaintiff for there to be conspiracy. If the predominant purpose is for the self interest or protection of the defendants, it is not an unlawful purpose and there is no conspiracy, even if the plaintiff incidentally suffers loss.

[44] In *Rookes v Barnard* [1964] 1 All ER 367 at p 297 … Lord Devlin said:

> There are, as is well known, two sorts of conspiracies, the *Quinn v Leathern (* [1901] AC 495…) type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means.

[45] In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at p 445 Viscount Simon LC said:

> It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If the predominant purpose is to damage another person and damages results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortuous conspiracy, even though it cause damage ….

[46] Therefore for conspiracy to take place, there must be an unlawful

object, or, if not in itself unlawful, it must be brought about by unlawful means. There must also be a co-existence of an agreement with an overt act causing damage to the plaintiff. Hence, this tortious act is complete only if the agreement is carried into effect, thereby causing damage to the plaintiff. To succeed in a claim based on the tort of conspiracy, it is pertinent for the plaintiff to establish the following:

(a) an agreement between two or more persons;

(b) for the purpose of injuring the plaintiff; and

(c) the execution of that agreement resulted in damages to the plaintiff.

[47] In the light of the principles as stated above, it is convenient for me at this juncture to consider the paragraph in the statement of claim alleging conspiracy. The paragraph reads as follows:

> Further or in the alternative, the 2nd Defendant negligently and/or with fully conspired and combined with the 1st Defendant's with the sole or predominant intention of injuring the Plaintiff and/or causing loss to the Plaintiff by ceasing to:
>
> (i) purchasing or
>
> (ii) cause to be purchased
>
> from the Plaintiff the pipes and fittings for all projects in respect of water supply services carried out in the State of Selangor including the Federal Territory of Kuala Lumpur and Putrajaya and instead directing all tenderers for these projects to interalia procure such pipes and fittings from 3rd parties and/or its nominees Laksana Wibawa Sdn. Bhd. and Musa and Rahman Plastic Industries Sdn. Bhd. and/or to be supplied such pipes and fittings from the 2nd Defendant.

[48] As enunciated in the cases mentioned above, there must be evidence of an agreement to cause damage. For this purpose a close look at the evidence tendered to determine the intention of the parties is required.

[49] The first and second defendants contended that the plaintiff is estopped from taking the position that it did not know of the concession agreement or its effect. DW2, Dato Ruslan Hassan, Chief Executive Officer of the second defendant and a director of the first defendant in his witness statement stated that Datin Juma'ah bt Moktar, who is the plaintiff's director, and also the plaintiff's shareholder and representative of Kumpulan Darul Ehsan Bhd (KDEB) was present and had in fact participated in the concession agreement negotiations. DW1 explained that:

> Prior to the execution of the Concession Agreement between the Second Defendant, Third Defendant and the Federal Government of Malaysia, negotiations were conducted between the Second Defendant, Third Defendant via the Jawatankuasa Penswastaan Kerajaan Negeri and the Federal Government via the

> Jawatankuasa Penswsataan Persekutauan led by officials of the Economic Planning Unit of the Prime Minister Department, on the terms of the Concession Agreement During the said negotiations, the Plaintiffs shareholder and representative. Kumpulan Darul Ehsan Berhad, which is also 30% shareholder in the Second Defendant was present and participated in the negotiations. KDEB was represented at different times by Datin Paduka Juma'ah Binti Moktar and Puan Maziyah Mohd Zin, the company secretary and Encik Zulkifli bin Hussain. Datin Paduka Juma'ah Binti Moktar is also a director in the Plaintiff according to the company search of the Plaintiff … (P3). I wish to state that it took 10 years of negotiations between the parties to finalise the said Concession Agreement.

[50] PW1 gave evidence that the plaintiff had no inkling whatsoever of the negotiations. The plaintiff only knew of the negotiations through market sources and the newspapers. However it was admitted by both PW1 and PW2 that Datin Paduka Juma'ah witnessed the signing of the agreement between the third defendant and KEDB dated 8 December 2004 ('D56') relating to the sale of shares of the first defendant by the second defendant.

[51] It is my considered view that it is highly inconceivable that the plaintiff was totally unaware of the negotiations relating to the concession agreement as its own directors were also involved in the negotiation. A transaction of this nature would have illicit great publicity due to the magnitude and scale of the project. The plaintiff being a active participant in the water industry would have been alerted and cannot now feigned knowledge. This fact was never denied by the PW1 nor PW2.

[52] In the instant case I find no evidence adduced by the plaintiff to show that there was any form of agreement between the second defendant with any third parties and/or its nominees, in particular, Laksana Wibawa Sdn Bhd and Musa and Rahman Plastic Industries Sdn Bhd with the dominant purpose of damaging and actually damaging the plaintiff. Innuendos and nuances have always been a fodder of the man on the street to form a myopic opinion that conspiracy exists. No evidence at all in this case was adduced by the plaintiff to prove an allegation of conspiracy.

[53] Based on the evidence both oral and documentary I am of the opinion that the plaintiff have failed to establish that the concession agreement was for the purpose of injuring the plaintiff and the execution of that agreement resulted in damage to the plaintiff.

[54] It has been shown through evidence that tenders were conducted by the second defendant where the plaintiff had also participated. The call for tenders to award the supply contracts were in conformity with the letter from the Ministry of Finance to the second defendant ('P41') which read as follows:

A … i) semua pakej kerja dan perolehan paip serta pemasangan harus dibuat secara tender seperti mana yang termaktub dalam perjanjian Konsesi dan bukannya secara terus daripada JAKs-KDEB bagi tujuan mengawal kos dan seterusnya kadar tarif air kepada pengguna; ….

B

[55] I cannot but bring to my mind to the provisions of the Water Supply (Successor Company) Enactment 2001 (Enactment 12/2001) Vesting Order No 1 wherein all properties, rights and liabilities of the third defendant in respect of all water supply services were vested to the first defendant. In
C pursuant of the aforesaid the Water Supply (Successor Company) Enactment 2001 and the issuance of a vesting order by the Menteri Besar of Selangor the third defendant has duly transferred all its rights and liabilities in respect of water supply services, including those arising under the supply agreement.

D **[56]** Thus I am of the view that the above acts by themselves were not unlawful neither were they brought by unlawful means. These acts were executed under existing and valid enactments and the vesting orders were properly issued in accordance with the laws and regulations at all material times.

E

[57] Based on the evidence I find that the second defendant was therefore neither negligent nor had willfully conspired and/or combined with the first defendant with the predominant or sole intention of injuring and/or causing
F loss to the plaintiff by ceasing to purchase or cause to be purchased the plaintiff's products as contended by the plaintiff.

Whether the third defendant has lawfully vested all its rights and/or obligations of the supply agreement dated 25 October 2001 between the plaintiff and the third
G *defendant to the second defendant*

[58] In order to answer this question it is pertinent to peruse and examine the historical background of the corporatisation and eventual privatisation exercise.

H

[59] By an agreement dated 15 March 2002 the third defendant and the first defendant agreed, inter alia, that the first defendant shall undertake to distribute and supply treated water to consumer and for that purpose the first
I defendant was vested with specified property, rights and liabilities in respect of water supply services in accordance with the Water Supply (Successor Company) Enactment 2001.

[60] Section 3(1) of the said Enactment provides as follows:

> … the Menteri Besar may, from time to time, by an order published in the Gazette, appoint a vesting date and on the date all property, rights or liabilities of the State Government in respect of water supply services specified by the Menteri Besar ….

[61] The aforesaid provision allows the third defendant to determine the date of the vesting of all the rights and liabilities to the first defendant.

[62] In this case the date of the vesting of rights and liabilities was determined but the order was only gazetted on 26 September 2003. It is immaterial when the vesting order was gazetted as long as it complied with the said enactment. The Menteri Besar is given the discretion under the law to appoint the vesting date. Therefore the date the vesting took effect was valid.

[63] Subsequently by an agreement dated 8 December 2004 the third defendant entered into an agreement with KDEB, the first and second defendants for the sale and purchase of shares of the first defendant. KDEB acted as attorney for Menteri Besar Incorporated (1994) ('MBI'). MBI is a body corporate established pursuant to the Menteri Besar (Incorporation) Enactment 1994. KDEB as attorney for MBI agreed to sell and the second defendant agreed to purchase the shares. The third defendant as the beneficial owner of the movable assets agreed to the sale transaction.

[64] The fourth schedule of the aforesaid agreement listed the existing work in progress contracts which included the supply agreement between the plaintiff and the third defendant. No contract sum was mentioned but it was stated that a payment of amount of RM87,696,105.77 was made leaving an outstanding amount of RM1,600,046.66. By virtue of this schedule the second defendant takes overall the obligation as listed and described there under. This would mean that the only amount payable by the second defendant to the plaintiff is only RM1,600,046.66.

[65] A concession agreement dated 15 December 2004 between the second defendant, the third defendant and the Federal Government of Malaysia granted the second defendant a concession for a period of 30 years commencing on 1 January 2005. The second defendant assumed all management duties and functions of the first defendant in the area of water supply and distribution of water to consumers within the State of Selangor and the Federal Territories of Kuala Lumpur and Putrajaya.

[66] Further upon the completion of the privatisation exercise the first defendant was issued a license on 1 January 2006 by the Jabatan Kawal Selia Air Selangor to 'mengutip dan menyimpan caj … yang masih terhutang oleh Pengguna …' ('P20'). The second defendant was issued a license ('P19') to, inter alia:

A (a) Menyenggara atau menjalankan atau dibenarkan untuk menggunakan atau menjalankan sesuatu sistem bekalan air ….

[67] PW2 had agreed when he was cross-examined that the purpose of the vesting orders is to vest all rights and liabilities of the third defendant to the first B defendant.

[68] The third defendant has no obligation under the law to inform the plaintiff about the vesting orders. The plaintiff being an active industry player knew or would have known of the vesting orders. The plaintiff is a consortium C consisting of JAKS Sdn Bhd and Kumpulan Darul Ehsan Bhd, which is one of the investment arms of the third defendant. Kumpulan Darul Ehsan Bhd had actively participated in the privatisation process. The plaintiff is therefore estopped from raising any objections to the vesting orders.

D **[69]** Both of the vesting orders are valid as it was made pursuant to s 3(1) of the Enakmen Bekalan Air (Syarikat Pengganti) 2001 which give powers to the Menteri Besar to vest all rights and liabilities of the State to a substitute company. Therefore I find that the third defendant has lawfully vested all its E rights and/or obligations of the supply agreement between the plaintiff and the third defendant to the second defendant.

CONCLUSION

F **[70]** Having considered the evidence adduced in its entirety together with the submissions of both counsel as well as authorities tendered in support of their respective cases I am satisfied that the plaintiff have not proven their claim against the defendants on a balance of probabilities. Accordingly I dismiss the plaintiff's claim against defendants with cost. Cost of RM50,000 to paid to the G first, second and third defendants.

Plaintiff's claim dismissed with costs.

H Reported by Kanesh Sundrum

I